No. 15,123

IN THE

United States Court of Appeals

For the Ninth Circuit

W. A. ROBISON, Administrator of the Estate of Robert Sidebotham, Deceased, ROBERT SIDEBOTHAM and JAMES SIDEBOTHAM,

Appellants,

vs.

HELENE MARCEAU SIDEBOTHAM,

Appellee.

APPELLANTS' REPLY BRIEF.

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INTRODUCTION.

Appellee in her brief claims with an air of injured innocence that appellants have charged her with being a calculating and conniving woman, an adventuress, and a violator of moral laws; her counsel claims that her amoral life should not be inquired into because it is immaterial and that her unconventional career is due to the fact that she had to live "with a blustering caveman egomaniac".

Ordinarily the life and character of appellee would not be material in an argument before this Court, and

it was with great reluctance that we delved into it. However, we were forced to bring out the unsavory details of appellee's career before and after marriage with Robert Sidebotham, deceased, because judged as a whole it shows that her main evidence to support her case was inherently improbable (see pages 14-17 and 19-21 of our opening brief). It also shows that she was not an innocent ignorant woman capable of being easily imposed on. Her settlement agreement of April 24, 1930, with Robert Sidebotham, her separate maintenance suit claiming community property rights inter alia, filed in Los Angeles on March 31, 1933, against Mr. Sidebotham, by *her present attorney,* and her letter of March 3, 1932, to the first Mrs. Sidebotham inquiring about her alimony, all show appellee to be an exceptionally well advised and avaricious woman; one who undoubtedly never relied on anything Mr. Sidebotham told her without checking it. She of all women had no business relying on any statement made to her by Mr. Sidebotham. When she told her lawyer in Nevada that there was "no community property" and swore to this statement in her divorce complaint she had undoubtedly investigated this matter and knew that her statement was true. This is corroborated by the fact that her astute counsel, whom she has had for 23 years at least, was unable at the trial to show any evidence that Mr. Sidebotham had any property at all at the time of the Nevada divorce.

We will discuss appellee's brief using the same headings which appellee used in her brief and in the same order.

TRACING OF ASSETS.

This subject, which is the most important subject in the case, is dealt with by appellee in three paragraphs which take less than a page of space in her brief (see page 6) and which neither contain any authorities nor discuss any of ours. Her complaint shows that she was the one who tendered the issue of identity of assets —that is, she pleaded that the assets which the Administrator of Robert Sidebotham's estate took over at the time of his death in 1951 were community assets which Robert Sidebotham had acquired during the married life of appellee and himself and which he had in his possession at the time of the divorce in 1946. Appellee's contention on this point is summed up in the second paragraph on page 6 of her brief as follows:

> "Appellants have failed utterly to point out by any reference to the evidence wherein the same was insufficient to support the findings or what illegal inferences were drawn therefrom by the trial court."

This is certainly a most naive argument for a skilled lawyer of long experience to make to this Court. It is elementary, as appellee's counsel well knows, that the burden of proof is on the party who has the affirmative side of the issue and certainly the plaintiff by her pleading assumed the affirmative side on this point, which she of course had to do, and the burden of proof is therefore on her. In addition to the condition of her pleading, we cited the following cases which as a matter of law hold that the burden of proof is on the surviving spouse to identify the property which she claims was

the community property of herself and her spouse when the marriage was dissolved. The cases on this subject which we cite below have been codified in Section 1963, Subdivision 40, of the Code of Civil Procedure of the State of California quoted on page 23 of our opening brief. The cases which we quoted or cited on this point in our opening brief are the following:

Estate of Simonton, 183 Cal. 53, 60, 190 Pac. 442;
Estate of Hanson, 126 CA (2) 71, 77, 271 P (2) 563, 567;
Estate of Doran, 138 CA (2) 541, 549 292 P (2) 655, 661;
Estate of Rattray, 13 C (2) 702, 705, 91 P (2) 1042;
Estate of Harris, 9 C (2) 649, 662, 72 P (2) 873;
Estate of Anderson 142 ACA 452, 453, 298 P (2) 105, 107 (June, 1956).

In accord also is:

Estate of Adams, 132 CA (2) 190, 196, 282 P (2) 190, 198.

WAS EVIDENCE INHERENTLY IMPROBABLE?

On this point appellee merely makes general statements that the Appellate Caurt is not allowed to weigh the testimony of witnesses. Appellee of course entirely overlooks the fact that where the testimony of a witness such as that of the appellee in this case is fantastic and obviously false, the general rule does not apply and that the Appellate Court has the right to disregard such inherently improbable testimony (pages 19-21 our opening brief). Here again appellee instead of analyz-

ing and discussing the testimony specified in our opening brief, merely attempts to laugh off appellants' specifications by generalities which prove nothing.

THE LAW.

Under this heading various unrelated points are made, only two of which need to be answered.

Appellee starts out by referring to page 22 of our opening brief in which appellants pointed out briefly that the opinion of this Court, which passed only on the sufficiency of the last complaint involved in the prior appeal reported at 216 Fed. 2d 816, has no materiality in this case because there was no trial of the facts involved on the previous appeal. Also that the evidence was far from supporting the important allegations of the complaint. Appellee meets this subject merely by saying:

> "Throughout the course of the trial and in the Reporter's Transcript of the evidence, not a single objection appears to the effect that any proof was offered at *variance with the pleadings.*" (All emphasis added).

Appellee has misconceived the purpose of our discussing the effect of the opinion on the earlier appeal. We do not claim that the judgment is erroneous because there is a fatal variance between the facts and the pleadings. What we claim is that the credible evidence in this case when taken as a whole does not prove the allegations in the last complaint, especially when the

inherently improbable testimony is disregarded. The opinion on the prior appeal did not discuss the all-important issue of tracing the assets back to the time of the divorce. Also such affirmative defenses as res judicata (based on the decree in the San Francisco Probate Court of December 14, 1953), and the defense of the Wyoming Decree, which dissolved the marriage of the parties in 1940, were not in any pleading before this Court on the prior appeal. Therefore, the prior opinion can have no bearing on these points.

Furthermore, the *evidence* produced by appellants in support of the affirmative pleas of laches and equitable estoppel was not before this Court in the earlier proceeding; what was said in the opinion before on these subjects only applies to the question of what facts were *pleaded* by *plaintiff* relating to these subjects. The evidence produced by appellants in support of these affirmative defenses pleaded in their answers was of course not before this Court on the prior appeal and could not possibly have been.

Near the bottom of page 9 appellee makes an entirely unrelated legal point, to wit, that since the defendants objected to certain evidence being received by the Court, which was entirely inadmissible because it was obviously hearsay, and also privileged under the attorney-client relationship, that trial Court presumed and this Court must as a matter of law presume that the evidence which was objected to and not received must have been adverse to the defendants and that this presumption would support plaintiff's judgment. In support of this presumption, appellee cited *White v. White,*

26 Cal. App. 2d 524, which states the general rule and properly applies it to the facts in that case.

Under the facts in this case, we have an entirely different situation and the rule found in Section 1973, Subdivision 5, of the California Code of Civil Procedure does not apply because it would be against common sense to apply the rule in the present case. The code section relied on is nothing but the statement of a universal rule of evidence. Professor Wigmore in his famous treatise on evidence (Volume 2, third edition, Section 286, page 168) points out that this rule should not be applied to evidence which is wholly inadmissible including that which is ordinarily considered confidential as a matter of law because of some relationship such as that of attorney and client.

> "Of course, a rule of evidence other than a rule of privilege for the party is a means of excluding evidence which he is always entitled to take advantage of; and his objection to prohibited evidence (or his failure to waive an objection) cannot in any way be construed to his disadvantage, since by hypothesis the evidence is prohibited, not for his personal sake on grounds independent of the value of the evidence, as privileged evidence is (post, sec. 2196), but because of the untrustworthiness of the evidence. No doubt a party usually does take advantage of such rules because the forbidden evidence is unfavorable, and no doubt the opponent constantly seeks by inuendo to give an unfavorable meaning to such objections. But the rules of evidence could never be enforced if parties were not guaranteed free scope in calling attention to the impending violation of the rules; and it is universally assumed and understood that

no inference can lawfully be urged in consequence of such objections."

This subject is well discussed in a note in 30 California Law Review at pages 80 to 81 as follows:

"It is not, however, to be inferred from every failure to produce a witness that the testimony of such witness would have been adverse to the non-producing party. The effect of the rule is circumscribed by common sense limitations. Thus it is held that the inference derived from the non-production of witnesses is not allowed to take the place of proof on any issue in order to make out a case against a party, but is available only after a *prima facie* case has been made out. In a criminal trial where the burden is on the people to prove facts necessary to establish the defendant's guilt, the latter is not required to prove anything and no inference can be raised against him for failure to offer any evidence. And where by law the prosecution is precluded from offering proof on any matter until the defendant has put that matter in issue, no unfavorable inference can be deduced from the defendant's failure to open the issue. Also failure to call a witness is always subject to explanation and where it is not in a party's power to produce a witness or where if produced he would be unlikely to give impartial testimony because of an interest adverse to the party, it cannot be inferred that the testimony of such witness would have been unfavorable to him.

Where there exists one of the privileged relationships set forth in section 1881 of the Code of Civil Procedure and the witness himself claims that privilege when called to the stand, the rule does not apply and no inference may be drawn.

> Similarly, where the court excludes testimony on a party's objection that it is privileged, no inference can be drawn that the testimony would have been adverse to the objecting party, it not being the policy of the law to exclude testimony and then raise an inference prejudicial to the party at whose insistence it was excluded."

There are several cases to the same effect in California, most of which are summarized in the recent case of *Thompson v. Hickman,* 89 CA (2) 356 at page 362-364; 200 P.(2) 893 at 897 (1949). The only testimony referred to on this point by appellee is the testimony of Mr. Frank J. Fontes, the attorney for the estate, as to a certain report ordered by and prepared for the use of the attorneys in this case by William Dolge and Co., Certified Public Accountants. It is obvious that the report referred to was prepared by William Dolge and Co. on the basis of information gathered from them outside of Court and is hearsay based on hearsay. No attempt was even made to produce any representative of William Dolge and Co. to testify as to the information gathered by his concern out of Court. In addition to this, the report of William Dolge and Co. was obviously a privileged communication, as the investigation and report were ordered by defense counsel to enable them to prepare the defense of the case, and under recent federal Court and California cases it is plainly a privileged communication

Schuyler v. United Air Lines, 10 F.R.D. 110, 111;

Scourtes v. Fred W. Albrecht Co., 15 F.R.D. 55, 58;

City and County of San Francisco v. Superior Court, 37 C (2) 227, 234, 231 P (2) 26, 29;
New York Cas. Co. v. Superior Court, 30 CA (2) 130, 132, 85 P (2) 965, 966;
McCormick on Evidence, p. 204, note 15.

At the bottom of page 10 appellee makes a brief argument on the subject of tracing the assets which belongs more properly under the heading, "Tracing of Assets" on page 6 of appellee's brief. However, the argument on the bottom of page 10 proves nothing because the contents of the safe deposit box which were found in 1952 do not show and no other evidence shows when they were placed in the safe deposit box or where they came from. Defendant's Exhibit L shows that Robert Sidebotham, deceased, went into his safe deposit box many times each year from May 22, 1945 down to the time of his death, and *fifteen* times *after* January 1, 1947 (Tr. 229-230). There is no testimony in the record that any of the contents of the box were ear-marked and the main contents consisted of 751 pieces of *undescribed* currency (denominations from $5.00 to $1,000.00 bills totalling $64,770.00 (Tr. 191-192).

Furthermore, the other main asset, namely, the real estate which Mr. Sidebotham bought about a year before his death and placed of record *in his own name* was certainly not owned by him at the time of the divorce. There is not an iota of evidence showing where the money came from with which the property was bought in 1950, and appellee makes no effort at all to show that this real estate which was sold for

$27,500.00 was the proceeds of any community property owned by this decedent at the time of the 1946 divorce.

DECREE OF HEIRSHIP.

The subject of the effect of the decree of the Probate Court made by the San Francisco Superior Court on December 14, 1953, is dealt with by appellee in a most casual manner and without the citation of any authorities in support of her position which have any bearing on this point. Appellee's main argument on this subject is that the issue in the Petition to Terminate Heirship under California Probate Code Section 1088, and the parties were different from any issue or the parties in the present case. Taking up the matter of the parties first, it is obvious from a slight examination of the pleadings in both cases that the parties were the same. The petitioner in the probate proceeding and the plaintiff in the Superior Court case which was transferred to the United States District Court were one and the same person, to wit, Helene Marceau Sidebotham. The defendants in the Superior Court case were Robert E. Sidebotham and James J. Sidebotham who appeared in the probate proceeding and were found by the decree to be the only heirs at law of said decedent, as in the decree of the Probate Court establishing heirship (Tr. 65).

They were made defendants in the action commenced in the Superior Court which was removed to the United States District Court by the appellee and she does not question but what they are the same

parties who appeared as respondents in the Probate Court.

Paragraph VIII of the Findings of Fact in the present case specifically states that

> "The defendants Robert Sidebotham and James Sidebotham are sons of the decedent by a prior marriage and are entitled to take as heirs at law."

This makes it clear that defendants Robert Sidebotham and James Sidebotham in this case are the same parties who appeared in the San Francisco probate proceeding as found in the decree establishing heirship (Tr. 65). The only difference as to parties in these two proceedings is that Phil C. Katz (Public Administrator of the City and County of San Francisco), Administrator of the Estate of Robert Sidebotham, and later his successor in office W. A. Robison as Administrator was an additional party defendant. It is well settled, however, that the administrator is merely a stakeholder holding the property for the real parties in interest, who in this case are the two sons, Robert Sidebotham and James Sidebotham, and apparently in this case if here judgment is affirmed. It was on the theory that the Administrator of the Estate of Robert Sidebotham was only a stakeholder and not a real party in interest that the case was removed from the San Francisco Superior Court to the United States District Court.

Sullivan v. Curry, 40 F (2) 948.

It is also well settled by California law that if the Administrator of the estate had not been made a party but the heirs at law had been the sole parties defend-

ant, any valid judgment obtained by the plaintiff would be binding upon the estate assets.

Hollyfield v. Geibel, 20 CA (2) 142, 66 P (2) 755;

Churchill v. Woodworth, 148 Cal. 669, 84 P 155.

It is very significant that of the thirteen cases cited by appellants on this point appellee attempted to distinguish only one and did not succeed in that effort.

There was only one issue set up in the petition in probate to determine heirship and that was one of the issues alleged in the Superior Court equity action. This will appear by comparison with the last complaint in the present action.

The allegations in the heirship petition briefly summarized are as follows (Tr. 61-64):

That Robert Russell Sidebotham died intestate during the month of December, 1951.

Then appellee alleged that the

> "estate consists of community property only, as well as increase thereof, all of which constitutes property of petitioner by virtue of the following facts" (Par. V of petition).

She then alleged the Mexican marriage on May 30, 1928, and the continuance of the marriage from May 30, 1928 up to the divorce on November 14, 1946. Then follows an allegation that the matrimonial domicile of the petitioner and Robert Sidebotham was at all times the State of California. Thereafter she alleged that during the marriage decedent accumulated and acquired real and personal property consisting in excess

of $75,000.00 cash on deposits in banks within the State of California, including real estate and other properties, nature and extent of which were unknown to petitioner. In the next paragraph of her petition she alleged that said community property had never been partitioned either by agreement of petitioner and Robert Sidebotham, judicial decision, or otherwise, and that upon the death of Robert Sidebotham petitioner became entitled to receive one-half thereof by survivorship and retain the other half thereof, which she at all times owned from the moment of its acquisition during the marriage.

The final complaint on which appellee relied is a jumble of several complaints, most of which are in the record on file, but they are not set out in logical order. However, summarizing the allegations of the various complaints as they appear in the record, the following allegations appear:

1. The marriage of appellee and Robert Sidebotham in Mexico on May 30, 1928 and the Nevada divorce on November 14, 1946 (Tr. 15-16).

2. That Robert Sidebotham died intestate on December 21, 1951 (Tr. 3).

3. That Robert Sidebotham at the time of his death was in possession and control of certain property described in Exhibit E attached and incorporated in the complaint; that he was likewise in possession and control of additional property the nature and extent of which was unknown to the plaintiff (Tr. 5); that at the time of the death of said Robert Sidebotham, plaintiff and he were tenants in common of said prop-

erty and each of them was an owner of an undivided one-half of said property; that since the death of Robert Sidebotham plaintiff continued to own an undivided one-half of said property as her separate estate.

4. That the Administrator of the Estate of Robert Sidebotham was in the possession of property which constituted property owned in common by plaintiff and Robert Sidebotham (Tr. 5).

5. That plaintiff all times mentioned was the owner of 50% of the assets and property, both real and personal, as well as the fruits and increase thereof, which Robert Sidebotham possessed at the time of his demise; that the property referred to in Exhibit A attached to the complaint constituted property acquired and accumulated by Robert Sidebotham during their marriage, as well as the fruits and increase there of (Tr. 12).

It is clear that the allegations just referred to as appearing in plaintiff's complaint (as amended at various times) contain everything that was alleged in her petition to determine heirship and that therefore the issues in the petition to determine heirship were in legal effect identically the same with some of the issues found in the Superior Court complaint filed in the City and County of San Francisco. This being so, the doctrine of res judicata must be applied.

29 *Cal. Jur.* (2) 198-200, sec. 238 Judgments.

THE DISTRICT COURT CONSIDERED THE WYOMING DECREE VOID.

We do not wish to weary this Court by repeating a summary of the facts or the authorities relied upon us on pages 34 to 36, both inclusive, of our opening brief.

The importance of this point is that if the District Court had given full faith and credit to the Wyoming Decree as it was required to by decisions construing the United States Constitution, the marriage would then have been legally dissolved as of the date of the Wyoming Decree, which was November 2, 1940. This would make it even more clear that appellee did not show that any of the property on hand at the time that Robert Sidebotham died in 1951 was owned by him in 1940 when the marriage was first legally dissolved.

Appellee again places her entire collateral attack on the following allegation in the affidavit filed prior to publication of summons in Wyoming, as follows:

> "That he (Robert R. Sidebotham) has exercised due diligence and inquiry as to the whereabouts of the above named defendant (appellee) and that he finds that said defendant does not reside in the State of Wyoming; that her residence is unknown and cannot with reasonable diligence be ascertained."

Appellee contends that this affidavit was false in the last sentence *and nowhere else* and that this was a fraud upon the Wyoming Court because the publication of summons could not be supported by such an

affidavit. It is uncontradicted that the first sentence quoted above from the affidavit is true, namely that the defendant did not reside in the State of Wyoming and could not by the exercise of due diligence and inquiry be found in Wyoming. Appellee does not deny that she was living in San Francisco, California, during all of this time. The statement by Robert R. Sidebotham that her residence was unknown and could not with reasonable diligence be ascertained may well have been true as far as his personal knowledge was concerned and there is nothing in the record to show that he knew *at that time* that the statement was *not* true. Since the law presumes the affiant spoke the truth (Sec. 1847, Calif. Code Civil Procedure) the burden of proof was on appellee to show that her husband was consciously lying at the time when he made this statement. Especially since the judgment was fifteen years old when she first attacked it at the time of the trial in 1955. Appellee's entire discussion of the facts on the question of the alleged false statement in the Wyoming affidavit is stated as follows on page 15 of her brief:

> "The testimony of the witness Mr. Scardino (Rep. Tr. P. 206 et al.), whose parents owned the hotel where the plaintiff visited in San Francisco and where decedent had been visiting her in the year 1940 and paid the rent corroborated plaintiff's testimony to the same effect."

Mr. Scardino never mentioned any specific day when he met Mr. and Mrs. Sidebotham together at 380 Union Street, San Francisco, but he did say twice that he met them during the month of February, 1940,

at these premises (Tr. 208-209) and again about three weeks after (Tr. 210), which could not have been later than March of 1940. Mrs. Sidebotham's testimony is no more specific as to time. Mr. Sidebotham's affidavit which appellee contends was false (in part only) was signed on August 6, 1940, and it is quite possible that Mr. Sidebotham may have attempted to locate Mrs. Sidebotham by letter in July of 1940 and that the letter was either returned by the post office or that he received no answer to his letter. He would, therefore, have the right to assume that she had disappeared and he would then be justified in stating that her address was unknown to him and it could not with reasonable diligence be ascertained by him. Certainly no Court has the right to assume on the basis of the testimony of Mr. Scardino or the similar testimony of the appellee, which is not specifically referred to in her brief, that he consciously made a false statement on August 6, 1940; this would not overcome the presumption that Mr. Sidebotham spoke the truth.

Appellee has not in our opinion successfully distinguished the many strong cases supporting appellants' contention on this subject, but appellants desire to point out that the case of *Delanoy v. Delanoy,* 216 Cal. 27 (13 P (2) 719) cited on page 15 by appellee is not in point in this situation. The *Delanoy* case was distinguished in *Baldwin v. Baldwin,* 28 C. (2) 406, 410; 170 P (2) 670, 673, in which it was held that if the foreign Court had jurisdiction of the parties the California Court would not allow a collateral attack on the decree because of false statements made at the trial.

In that case the California Supreme Court upheld the trial Court in refusing to permit a wife

> "to introduce evidence to prove her claim that defendant (husband) was the wrongdoer and that his Nevada divorce was secured by untruthful testimony regarding acts of cruelty by plaintiff towards defendant."

Basing its decision on this point on the case of *Williams v. State of North Carolina,* 317 U.S. 287, *Patterson v. Patterson,* 82 CA (2) 838, 841, 187 P (2) 113, 114, followed the *Delanoy* case on this point. In its opinion the District Court of Appeal said:

> "Plaintiff attacks the Nevada decree on the ground of fraud. She argues it was obtained by false testimony of her cruel treatment of defendant. A similar argument was made and rejected in the case of Baldwin v. Baldwin, 28 Cal. (2) 406, 170 P (2) 670, on the authority of Williams v. State of North Carolina, 317 U.S. 287."

Furthermore since the allegation in the affidavit "that said defendant (appellee) does not reside in the State of Wyoming" (Defs' Ex. E) is admittedly true, other allegations in the affidavit whether true or false are immaterial and should be disregarded. As is said in 21 *Cal. Jur.* 510, sec. 33:

Process:

> "Services of summons by publication is authorized where it sufficiently appears by affidavit that 'the person on whom service is to be made resides out of the state.' If this fact is shown by the affidavit, it is not necessary to set

forth therein that such person cannot after due diligence be found within the state; any such statement is immaterial."

This text statement is supported by the following cases:

Anderson v. Goff, 72 Cal. 65, 69, 13 Pac. 73, 75;
Ligare v. California South. R. Co., 76 Cal. 610, 612, 18 Pac. 777, 780;
Parsons v. Weiss, 144 Cal. 410, 415, 77 Pac. 1007, 1010.

It cannot be successfully argued that the Wyoming Court did not have jurisdiction to act because the plaintiff was in Wyoming and got jurisdiction over the defendant by the publication of summons following an affidavit containing the one and only important fact required in this case by the revised statutes of Wyoming (Sections 89-817-822, 1931 Edition), namely that the defendant (appellee) did not reside in the State of Wyoming. A similar form of affidavit was approved against *direct* attack by the Supreme Court of Wyoming and the Supreme Court of the United States, *Clarke v. Shoshone Lumber Co.,* 224 Pac. 845, 849, 276 U.S. 595. It is elementary that Courts will not limit attacks on direct appeal (as in the cited case) as much as they will on collateral attack as in the present case.

It is well settled that the federal Courts will give the same weight to the decision of a sister state that the Courts of that state will give its judgment. As was said in *Morris v. Jones,* 329 U. S. 545 at 551, 67 S. Ct. 451, 456:

"The full faith and credit to which a judgment is entitled is the credit which it has in the state from which it is taken."

See to the same effect

50 C.J.S. 482, notes 69 and 70.

Accordingly the federal Court must give the Wyoming decree full faith and credit because, as shown by the case of *Clarke v. Shoshone Lumber Company,* supra, the affidavit in this case was found to be satisfactory by the Wyoming Supreme Court *even on direct attack on appeal.*

It is elementary that a federal Court as well as a sister state in testing the validity of the judgment of another state on collateral attack requires clear and convincing factual proof of the invalidity of the original judgment. As was said by Mr. Justice Frankfurter in *Williams v. North Carolina,* 325 U.S. 226, 233, 65 S.Ct. 1092, 1097, as to a foreign decree:

"It is entitled to respect *and more.* The burden of undermining the verity which it imports *rests heavily upon the assailant.*"

A strong discussion of the sanctity of such decrees is found in *Marcus v. Marcus,* 90 N.Y.S. (2) 830 at 836, where the learned judge said as follows:

"Those who impugn such decrees are not to succeed by any mere 'fair preponderance'; *they must do far more.* They must present proof meeting the tests indicated by the few cases on the subject; this defendant's evidence plus the decree will protect her remarriage unless plaintiff's 'countervailing evidence', or her admissions, etc., 'satis-

fies the court' that 'error was committed' by the Nevada court, Selkowitz v. Selkowitz, 272 App. Div. 1071, 74 N.Y.S. 2d 532, supra; that countervailing proof must be such as 'establishes' lack of jurisdiction, Dalton v. Dalton, 270 App.Div. 269, 270, 59 N.Y.S. 2d 68, 70, citing Matter of Holmes' Estate, 291 N.Y. 261, 52 N.Y.S. 2d 424, 150 A.L.R. 447. The decree *'is entitled to respect, and more.* The burden of undermining the verity which (it) import(s) *rests heavily upon the assailant',* 2d Williams v. North Carolina case, 325 U.S. 226, 233-234, 65 S.Ct. 1092, 1097, 89 L.Ed. 1557, 157 A.L.R. 1366; there must be 'a factual demonstration of its invalidity', Pereira v. Pereira, 272 App.Div. 281, 287, 70 N.Y.S. 2d 763, 767; the attack must 'overthrow the apparent jurisdictional validity * * * by disproving (her) intention to establish a domicile' in Reno, Matter of Franklin v. Franklin, 295 N.Y. 431, 434, 68 N.E. 2d 429, 430, citing 2d Williams case, supra." (All emphasis supplied.)

Where an affidavit, on which a publication of summons is based, seems insufficient or defective, a Court in which a decree, valid on its face, is being attacked collaterally because of the affidavit, will go to almost absurd lengths in presuming there was other sufficient proof (such as another affidavit) to support the decree.

Kaufman v. California Mining Syndicate, 16 C (2) 90, 93, 104 P (2) 1038 at 1040;

Sacramento Bank v. Montgomery, 146 Cal. 745, 751, 81 Pac. 138, 140, per Angellotti, C.J.

It must also be remembered that appellee cannot collaterally attack the Wyoming Decree for any false-

hood in the affidavit of publication because the affidavit was not properly made a part of the judgment roll in 1940 according to Wyoming Law (Wyoming Compiled Statutes of 1945, Section 3-5406). See *In re McNeil's Est.,* 155 Cal. 333, 341, 100 Pac. 1086, 1089 (Utah). *Hoagland v. Hoagland,* 57 Pac. 20 at 22.

LACHES AND ESTOPPEL.

Here again appellee's answer to our argument as to the application of the doctrines of laches and of equitable estoppel does not begin to answer our contentions. Appellee ignores most of the facts in the record on this point, some of which are stated in appellants' opening brief, and all of the authorities cited by us, except *Champion v. Wood.* As this Court well knows, it is impossible usually to cite cases which are absolutely identical in all their facts. We still contend, however, as shown by our discussion on pages 37 to 40 of this case in our opening brief that the language in the opinion in *Champion v. Wood* comes closer to fitting our case than any other decision possibly could. The only case cited by appellee on this point is *Tarien v. Phil C. Katz,* 216 Cal. 554. In this case the parties were married on December 9, 1919 and divorced on May 11, 1926 The main question was the identification of certain property found in his estate after his death in 1930. The Court in discussing the nature of this property said in its opinion:

> "The source of the property in dispute was known to exist as early as July, 1922, and certain other accumulations were known to be in existence in 1926 (year of divorce). From these assets were

> traced the property in suit. The character thereof must be determined from the testimony of plaintiff herself."

The Court held that while there was a conflict in the testimony as to whether the property was community or separate, that the wife's testimony to the effect that it was community property was sufficient to support the judgment of the Court to this effect. There is nothing in this opinion which gives appellee any comfort.

The decision of this Court in 216 F (2) 816 on which appellee so confidently relies with childlike faith as to the defenses of laches and estoppel is not applicable here because the following evidence was not before the Court on the prior appeal when it was considering the sufficiency of the complaint:

1. The *separation* of the parties which commenced on February 2, 1932, according to appellee's complaint in the Los Angeles Court (Defs'. Ex. C) and continued almost continuously from then until the Wyoming decree in 1940 and thereafter until Robert Sidebotham's death in 1951.

2. The filing of the separate maintenance action in Los Angeles in 1933 with its reference to "community property" and allegations of defendant's *fraud* and extreme physical as well as mental cruelty. This action it should be remembered was *never dismissed.* (Tr. 96.)

3. The failure of Robert Sidebotham to give appellee any support or financial help of any kind or even to communicate with her at any time between 1940 and 1951 when he died (Tr. 99).

These matters all show that as a matter of law the confidential relationship between her said husband and herself ceased at least as early as February 2, 1932. (The date fixed in her separate maintenance complaint —Defendants' Exhibit C.) Thereafter she had no right to rely on anything her husband told her; legally the bar of the doctrine of laches started to run against her in 1933 when she retained her present attorney to enforce her rights against her husband.

As to the confidential relationship between the parties ceasing as of February 2, 1932, when appellee no longer had any right to rely on any of her husband's representations see:

Chadwick v. Chadwick, 95 Cal. App. 690, at 709, 273 Pac. 86, 90;

Migala v. Dakin, 99 Cal. App. 60, 63, 277 Pac. 898, 900;

Champion v. Wood, 79 Cal. 17, at 21, 21 Pac. 534, 535.

It should also be remembered that the death of Robert Sidebotham (the real defendant in this case) with the disappearance of all his records, so long after his long marital separation and his two divorces, makes a complete showing of laches.

See *Harris v. Harris,* 196 F (2) 46, 47, (D.C. Ct. of App., 1952) where 14 years delay in assertion of rights followed by death was held to constitute laches as a matter of law.

MISCELLANEOUS RULINGS ON EVIDENCE.

We will not discuss the erroneous rulings on evidence at length because most of the rulings which are set out in the record show on their face without any argument that they are erroneous. These are fully set out with the arguments of appellants' counsel supporting their objections on pages 42 to 48 of the opening brief. Most of the evidence admitted over appellants' objections was obviously hearsay. Much of the evidence of Mr. Daniel J. Byrne, manager of the safe deposit vaults of the Savings Union Branch of the American Trust Company related to documents which his bank received from a neighboring bank which had a safe deposit department and went out of business. The records were made by a person or persons not in the employ of the American Trust Company and certainly not under the supervision of Daniel J. Byrne or under any other employee of the American Trust Company. It is obvious that all of those records were improperly admitted. The summary of accounts with certain banks, building and loan associations and stockbrokers was obviously based on hearsay and should not have been admitted. However, even if they were properly admitted on the basis of the time elements involved, only $2,828.48 was identifiable as being within the proper time period (p. 47 opening brief). The last evidence erroneously admitted consisted of a report of the United States Government Income Tax Agent, which was very obviously based on hearsay and requires no further argument by appellants.

Appellee's answer to this contention is contained in one page starting on page 25 and ending on page 26 of her brief. There is no denial of the facts stated by us nor any discussion of any authority cited by us. The only argument made by appellee on this point is found in the last paragraph on page 26 where she says:

> "The lower court accordingly, thought it best, that the same (question of fees) be disposed of by the Probate Court, which court had all of the facts before it, and which facts were not offered into evidence by either of the parties in the pending litigation."

There are two incorrect statements in this part of appellee's brief:

1. That the Probate Court had all of the facts before it, and

2. That the facts were not offered into evidence by either of the parties in the pending litigation.

The record can be searched from stem to stern without finding any reference to what evidence, if any, on this subject was before any Probate Court and full facts were offered into evidence by defendant W. A. Robison, the Administrator in this case through his counsel on February 27, 1956. (See Supplemental Transcript of Record, pages 248 to 250). Particularly the verified petition which was *received in evidence* at that time. The copy of the verified petition itself is found on pages 50 to 55 of the main transcript of record.

We believe that appellee is attempting to make the argument which was made by the trial Court in denying this petition, namely, that the matter of reimbursing the Administrator for his costs of defending the action, including the attorneys' fees, should more properly be disposed of by the Probate Court. However, as was pointed out to the trial Court and stated in our opening brief on this subject, there is a manifest inequity in requiring the balance of the estate not affected by this judgment (approximately one-half) to pay all of the expenses of the defense of this action and to allow appellee to walk away with half of the estate and not pay her share of the expense of bringing the appellant administrator into Court and forcing him to defend a difficult case for a dead man who left no records. Since appellee has not discussed the incontestable authorities cited and discussed by us on pages 4 to 10 of our separate opening brief on the subject of the allowance of expenses of defense, we can consider that appellee has in effect defaulted on this subject and that our brief on this point remains unanswered. Since most of the services rendered by appellant administrator and his attorneys were performed under the eyes of the District Judge, certainly the Judge of that Court is much more competent to value such services than the Probate Court would be.

Wherefore, appellants pray that the judgment of the learned District Court be reversed with instructions to dismiss appellee's action with costs to appellants. If by any chance the judgment should be affirmed then this Court should instruct the District

Court to award the administrator and his attorneys the costs of defending the action.

Dated December 14, 1956.

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